

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B5

DATE: AUG 02 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal from that decision. The petitioner then filed a motion to reconsider, which the AAO dismissed as untimely. The petitioner has now filed a second motion to reconsider. The AAO will, again, dismiss the motion as untimely.

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. 8 C.F.R. § 103.5(a)(1)(i).

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The latest motion includes a letter from attorney [REDACTED]. The motion does not, however, include a newly executed Form G-28 Notice of Entry of Appearance as Attorney or Representative identifying [REDACTED] as the petitioner's attorney of record. Furthermore, [REDACTED] does not specifically claim to be the petitioner's attorney. Rather, he states that the petitioner "asked our office to facilitate mailing this I-290B on his behalf." The AAO will consider the petitioner to be self-represented for the purposes of this proceeding.

Any motion to reconsider an action by USCIS filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. 8 C.F.R. § 103.5(a)(1)(i). Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing. 8 C.F.R. § 103.8(b). The date of filing is not the date of mailing, but the date of actual receipt. USCIS will not consider a submission to be properly filed unless it includes the proper fee. See 8 C.F.R. §§ 103.2(a)(1) and (7)(i).

The AAO dismissed the petitioner's previous motion on December 13, 2011. The AAO advised the petitioner that, if he desired to file a new motion, "[a]ll motions must be submitted to the office that originally decided [the] case" – in this instance, the Texas Service Center.

On January 12, 2012, the AAO received the petitioner's latest motion. The AAO returned the filing because the AAO does not accept direct filing of appeals or motions. The Texas Service Center received the motion on January 25, 2012, 43 days after the AAO issued its prior decision. Attorney [REDACTED] stated:

Our clerk did not realize the application was to go to the “Texas Service Center, AAO Office,” as the return address on the denial was from the Washington Office, which in general is the correct office to submit appeals. . . .

We ask that you accept the stamped Form I-290B as being timely filed as this error was through no fault of the petitioner.

The AAO’s address in Washington, DC is not “in general the correct office to submit appeals.” The instructions to Form I-290B, Notice of Appeal, specifically state that appeals and motions are not to be filed directly with the AAO. Furthermore, while the regulation at 8 C.F.R. § 103.5(a)(2) states that late filing “may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner,” that clause applies only to motions to reopen, not to motions to reconsider. Furthermore, misfiling of the motion, when the AAO stated that the motion was to be filed with “the office that originally decided [the] case,” is not beyond the control of the petitioner.

The petitioner did not properly file the motion in a timely manner, and therefore the AAO must dismiss the motion under the regulation at 8 C.F.R. § 103.5(a)(4).

Even if the motion were timely filed, the AAO would dismiss the motion to reconsider as deficient. The motion is based on the assertion that the AAO erred in its prior dismissal of the first motion to reconsider. In that earlier decision, the AAO stated:

On December 17, 2010, USCIS received the petitioner’s motion with a \$650 filing fee. Because the petitioner did not submit the correct fee [of \$630], USCIS rejected the motion. The petitioner later resubmitted the motion with a \$630 fee on January 3, 2011, 47 days after the date of the AAO’s dismissal notice. Accordingly, the petitioner did not properly file a timely motion.

The petitioner asserts: “USCIS and the government received its fee. . . . The Government has not been deprived of its filing, such as [would be] the case where the check was returned unhonored by the bank, or no filing fee, or too little filing fee was submitted.” The petitioner claims: “The Ninth Circuit has recognized that the overpayment of a filing fee should not result in the rejections of a notice of appeal. Lopez-Vega v. Keisler, 257 Fed. Appx. 47 (9th Cir. 2007) (unpublished).”

A notation in the decision states: “This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.” *Id.* at 48. Therefore, the decision is not a controlling authority in the present proceeding. Even then, the decision does not say, as the petitioner claims, that “overpayment of a filing fee should not result in the rejections of a notice of appeal.” Rather, the decision states that the government must justify such a rejection:

With regards to the fee, the language of the rejection notice suggests that Lopez-Vega paid *more* than the amount due. We fail to understand how an overpayment would result in the rejection of a notice of appeal; none of the authorities cited by the government, including the administrative regulations, directs such a result.

We therefore grant the petition for review, and remand to the BIA. Upon remand, the BIA shall *either*: (1) clarify with specificity the filing defects and the authority under which such defects would justify the rejection of the first notice of appeal and render the second notice of appeal untimely; *or* (2) deem the notice of appeal timely filed and conduct further proceedings accordingly.

Id. at 49. An explanation of the filing defect, and the authority for rejecting the appeal based on that defect, would satisfy the above instructions. The USCIS regulation at 8 C.F.R. § 103.2(a)(7)(i) states: “A benefit request which is not . . . submitted with the correct fee(s) will be rejected.” The regulation plainly requires not that the fee be “sufficient,” which would refer only to underpayment. Rather, the fee must be “correct,” neither underpaid nor overpaid. The petitioner, therefore, has not shown that the AAO erred in dismissing the prior motion to reconsider.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The motion was untimely filed; does not establish that the decision was based on an incorrect application of law or USCIS policy; and does not establish that the decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, the AAO must dismiss the motion.

ORDER: The motion is dismissed.